HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

Writ Petition No.18205 & 18801 of 2003

Writ Petition No.18205 of 2003

Between:

District Bar Association, Karimnagar rep. by its Secretary, P. Ramulu

... Petitioner

And

The Union of India, rep. by its Secretary, Law Department, New Delhi and others.

... Respondents

Writ Petition No.18801 of 2003

Between:

Telangana Lawyers Association, rep by its Joint Secretary, Shri M. Krishna Reddy

... Petitioner

And

The Government of Andhra Pradesh, Rep. By its Secretary to Government, Law Department, Secretariat and others.

... Respondents

:: ORDER::

Counsel for the Petitioners: Sri S. Satyam Reddy

Counsel for the Respondents: Government Pleader for Home

December 27, 2006

Per G.S. Singhvi, CJ

In these petitions filed by two associations of the Advocates, prayer has been made for striking down Section 24 (6) of the Code of Criminal Procedure, 1973 (for short, 'CrPC') and G.O.Ms.No.102, Law (LA & J Courts A2) Department, dated
8-8-2003 issued by the State Government for encadrement of 15 posts of Additional Public Prosecutors Grade-I and 12 posts of Public Prosecutors.

In the affidavits filed by them, Shri P. Ramulu, Secretary, District Bar Association, Karimnagar, and Shri M. Krishna Reddy, Joint Secretary, Telangana Lawyers Association have emphasized the imperative of keeping the prosecuting officers totally free from the governmental control and pleaded that the mode of recruitment prescribed under Section 24 (6) of CrPC, which has the effect of excluding the practicing advocates from the zone of eligibility is abhorrent to this concept. They have referred to Section 24 (4) of CrPC, which provides for preparation of panel of suitable persons, in consultation with the Sessions Judge for appointment as Public Prosecutors and Additional Public Prosecutors in the district and averred that the non-obstante clause contained in sub-section (6) of Section 24 not only dispenses with the requirement of consultation with the Sessions Judge, but also confers unbridled power on the executive apparatus of the State to select the persons of their choice. They have also pleaded that exclusion of the members of legal profession from the zone of eligibility for recruitment to the posts of Additional Public Prosecutors and Public Prosecutors is clear antithesis of the requirement of Prosecutors who are supposed to act independently and not succumb to the pressures of the executive and political apparatus of the State. They have questioned G.O.Ms.No.102, dated 8-8-2003 on the ground that encadrement of the posts of Additional Public Prosecutors Grade-I and Public Prosecutors will have the effect of depriving the practicing Advocates of their right to compete for selection and appointment on those posts.

The stand of the State Government, as reflected in paragraphs 2 to 8 of the affidavits filed by Shri K. Bhikshamaiah, Deputy Secretary to Government, Home (Courts) Department, is that Assistant Public Prosecutors and Senior Assistant Public Prosecutors are appointed under Section 25 of CrPC and

they work under the control of Director of Prosecutions, who is also head of the department. According to Shri Bhikshamaiah, the State Government has, after considering the recommendations of the Law Commission of India, created Prosecution Department and there is a regular cadre of Public Prosecutors who conduct cases in different Courts. It is also the case of the State that the method of appointment laid down in the Andhra Pradesh State Prosecution Service Rules, 1992 (for short, 'the 1992 Rules') ensures that experienced persons are appointed on higher posts.

Shri S. Satyam Reddy, learned counsel for the petitioner associations lamented that despite the recommendations made by the Law Commission, the Parliament and the State Legislatures have not taken steps to enact laws making the Prosecutors totally independent of the governmental control and argued that exclusion of the practicing advocates from the zone of eligibility for recruitment as Additional Public Prosecutors and Public Prosecutors will have serious adverse impact on the criminal justice system in the State. He argued that the rules framed under Section 24 (6) are in direct conflict with Section 24 (7) inasmuch as, the rules provide for recruitment of Additional Public Prosecutors and Public Prosecutors from among the members of Prosecution Cadre whereas in terms of Section 24 (7), a person is not even eligible to be appointed as Public Prosecutor or Additional Public Prosecutor unless he has been in practice as an Advocate for not less than seven years. Learned counsel then submitted that by virtue of Section 24 (6), all other sub-sections have been rendered redundant and the executive apparatus of the State has been given total control over the Prosecutors. Shri Reddy assailed G.O.Ms.No.102, dated 8-8-2003 by arguing that encadrement of 12 posts of Public Prosecutors and 15 posts of Additional Public Prosecutors in the Prosecution Cadre for 12 districts in the State will deprive the Advocates of their right to compete for selection and appointment in accordance with Section 24 (4) and (5) of CrPC.

Learned Government Pleader for Home defended the recruitment of Additional Public Prosecutors and Public Prosecutors from among Assistant Public Prosecutors by arguing that they not only fulfill the academic qualification, but also have sufficient experience of working in the Courts of

Munsifs. He submitted that Section 24 (6) was introduced by CrPC (Amendment) Act, 1978 for ensuring that only experienced persons handle the cases involving serious offences which are tried in the Sessions Courts. Learned Government Pleader further argued that the 1992 Rules have been framed by the State Government keeping in view the provisions of Section 24 (6) of CrPC and the apprehension of the petitioners that recruitment of Prosecutors in accordance with the 1992 Rules will adversely affect the independence of the Prosecutors is not well founded. He emphasized that the members of the Prosecution Cadre have been discharging their duties independently uninfluenced by any pressure from the political or executive branches of the State and argued that the prayer made by the petitioners for striking down the rules should be rejected. On the issue of encadrement of 12 posts of Public Prosecutors and 15 posts of Additional Public Prosecutors, learned Government Pleader submitted that this has been done with a view to ensure that only those persons who have gained sufficient experience of working as Prosecutors in the Courts of Munsifs and Chief Judicial Magistrates are entrusted with serious cases triable in the Sessions Courts.

We have given serious thought to the respective arguments. For deciding the issue raised by the petitioners, it will be useful to notice the relevant statutory provisions. The same are as under:

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Sections 24 and 25 of CrPC.

Sections 24 and 25 of CrPC, which relate to appointment of Public Prosecutors and Additional Public Prosecutors in the High Court and Districts or local area and Assistant Public Prosecutors in the Courts of Magistrates, read as under:

> "**24. Public Prosecutors:**
> (1)For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub- section (3) or sub-section (6), only if he has been in practice as an Advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has

rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.

25. Assistant Public Prosecutors:

1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the courts of Magistrates.

1A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the courts of Magistrates.

2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in-charge of that case:

Provided that a police officer shall not be so appointed –

a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

b) if he is below the rank of Inspector."

<u>Andhra Pradesh Prosecution Service Rules, 1992</u>

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India read with Sections 24 and 25 of CrPC, the Governor of Andhra Pradesh made the 1992 Rules for the Andhra Pradesh State Prosecution Service. Rules 2, 3 and 5 of the 1992 Rules, which provide for constitution of the service, method of appointment and qualifications, and have bearing on the decision of the writ petition, read as under:

"**2. Constitution:-**

The Service shall consist of the following categories of posts in the Andhra Pradesh State Prosecution Service.

Category-1:	Director of Prosecutions
Category-2:	Additional Director of Prosecutions
Category-3:	Public Prosecutor/Joint Director of Prosecutions
Category-4:	Additional Public Prosecutors Grade-I/ Deputy Director of Prosecutions
Category-5:	Additional Public Prosecutors, Grade-II
Category-6:	Senior Assistant Public Prosecutor
Category-7:	Assistant Public Prosecutor

3. Method of Appointment:-

Subject to the other provisions in these rules, the method of appointment for the several categories shall be as follows:-

S.No.	Category (1)	Method of appointment (2)
1.	Director of Prosecutions	a) By promotion from the category of Additional Director of Prosecutions Category with a service of not less than 2 years. b) If no suitable candidate is available for promotion in the category of Additional Director by transfer or on deputation from the State Higher Judicial Service. OR c) By transfer or on deputation from the IPS cadre of the Andhra Pradesh an officer over and above the rank of Deputy Inspector General of Police possessing a Law Degree.
2.	Additional Director of Prosecutions	By promotion from the category of Public Prosecutor/Joint Director of Prosecutions, Category-3 with a service of not less than 2 years or by transfer or on deputation from Andhra Pradesh State Higher Judicial Service.

3.	Public Prosecutor/Joint Director of Prosecutions	By promotion from the category of Additional Public Prosecutor –Grade-I/Deputy Director of Prosecutions Category-4 with a service of not less than 2 years or by transfer or on deputation from the State Judicial Service of the cadre of Sub-Judges.
4.	Additional Public Prosecutor, Grade-I/Deputy Director of Prosecutions	By promotion from the category of Additional Public Prosecutor, Gr.II, Category-5 with a service of not less than 3 years or by transfer or on deputation from State Judicial Service of the Cadre of Munsif Magistrate.
5.	Additional Public Prosecutor, Grade-II	(i) 70% by promotion from the Category-6 Senior Assistant Public Prosecutor with a service of not less than 2 years. (ii) 30% by direct recruitment
6.	Senior Assistant Public Prosecutor	By promotion from the Category – Assistant Public Prosecutor with a service of not less than 2 years.
7.	Assistant Public Prosecutor	By direct recruitment.

Note:

a) 30% of the substantive vacancies in the category of Additional Public Prosecutor, Gr.II (Category-5) shall be filled by direct recruitment.

b) The remaining vacancies in the category of Additional Public Prosecutor, Grade-II shall be filled by promotion from the Category-6. If a suitable or qualified person in the category of Senior Assistant Public Prosecutor is not available, the said vacancies shall also be filled by direct recruitment or by contract.

c) The State Level Recruitment Board in Police Department shall from time to time hold the examination/selection for the candidates for appointment by direct recruitment."

5. QUALIFICATIONS:

No person shall be eligible for appointment to the categories specified in column (1) of the Table below by the method specified in column (2) unless he possesses the qualifications specified in the corresponding entry in column (3) thereof:-

Category	Method of Appointment	Qualifications

5.Additional Public Prosecutors	By direct recruitment or by promotion	i) Must possess a Bachelor's Degree in any subject with a Bachelor's Degree in Law of a University in India established or incorporated by or under a Central Act a Provincial Act or a State Act or an Institution recognized by the University Grants Commission or an equivalent qualification. ii) Must have practiced as an Advocate for not less than seven years for direct recruitment.
7. Assistant Public Prosecutor	By direct recruitment	i) Must possess a Bachelor's Degree in any subject with a Bachelor's Degree in Law of a University in India established or incorporated by or under a Central Act a Provincial Act or a State Act or an Institution recognized by the University Grants Commission or an equivalent qualification. ii) Must have practiced as an Advocate and must have not less than 3 years active practice in Criminal Courts in the State.

AMENDMENT

Provided that the candidates having passed the five year course in Law after Intermediate shall also be eligible for recruitment to the posts of APPs (Added as per G.O.Ms.No.448, Home (Courts-C) Dept., dt.16-9-92."

Analysis of the statutory provisions:

Section 24 (4) envisages that the District Magistrate shall, in consultation with the District and Sessions Judge, prepare a panel of the names of persons who are considered fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district. Sub-section (5), which is couched in negative form, declares that no person shall be appointed by the State Government as Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel prepared under sub-section (4). However, the prohibition contained in sub-section (5) is subject to the non-obstante clause contained in sub-section (6), which lays down that if there exist a cadre of prosecuting officers, the State Government shall appoint

a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such cadre. Proviso to this section enables the State Government to revert to the panel prepared under sub-section (4), if suitable person is not available in the cadre of prosecuting officers.

The 1992 Rules provide for direct recruitment to the cadres of Assistant Public Prosecutors (100%) and Additional Public Prosecutors Grade-II (up to the extent of 30%) through the agency of the Andhra Pradesh State Level Recruitment Board (hereinafter referred to as 'the Board'). The minimum qualifications prescribed for the post of Assistant Public Prosecutors are Bachelor's Degree in any subject with a Bachelor's Degree in Law of a University in India established or incorporated by or under a Central Act, a Provincial Act or a State Act or an Institution recognized by the University Grants Commission or an equivalent qualification and at least three years' practice as an Advocate in Criminal Courts in the State. For the post of Additional Public Prosecutor Grade-II, the minimum academic qualification is identical to the one prescribed for the post of Assistant Public Prosecutor, but the candidate is required to possess experience of at least seven years as an Advocate. This shows that at the entry level, in the cadre of Prosecutors, the Advocates having requisite experience are eligible to be considered. The requirement of seven years experience as an Advocate for appointment as Additional Public Prosecutor Grade-II by direct recruitment is in consonance with Section 25 (7) CrPC. The Additional Public Prosecutors Grade-II up to the extent of 70%, Additional Public Prosecutor Grade-I/Deputy Director of Prosecutions, Public Prosecutor/Joint Director of Prosecutions, Additional Director of Prosecutions and Director of Prosecutions are required to be filled by promotion. The reason why the rule making authority has not provided for direct recruitment to these posts is not far to seek. By providing recruitment to these posts only by promotion, the rule making authority wanted to ensure that only persons with sufficient experience of having worked as Prosecutors in the lower Courts are assigned the task of dealing with more serious cases in the higher Courts. This is also intended to ensure that the members of the lower cadre have adequate avenues of promotion, which will continue to inspire them to give their best to the society.

In our opinion, the decision of the State Government to constitute Prosecution Cadre and regulate recruitment to encadred posts by framing rules under proviso to Article 309 of the Constitution does not, in any manner, violate Sections 24 (4), (5) or (7) and the 1992 Rules cannot be declared ultra vires the provisions of Section 24 of CrPC merely because they do not provide for direct recruitment to the posts of Additional Public Prosecutors Grade-I, Public Prosecutors and other higher posts. What should be the methodology of recruitment to the particular service or post, what should be the source of recruitment and what should be the qualifications are matters which lie in the exclusive prerogative of the employer and the Court cannot interdict in these matters unless it is shown that the rules regulating recruitment to any particular service or post is violative of the doctrine of equality or any other constitutional provision or law enacted by the competent legislature. The Court cannot impose its views on the employer and direct that recruitment to the particular service or a post should be made by the method which it deems proper. Any such direction would amount to unwarranted transgression on the employer's prerogative to make recruitment. It may also amount to usurpation of the rule making power of the State.

The argument of Shri S. Satyam Reddy that the scheme of the 1992 Rules denies the practicing Advocates of the right to be considered for recruitment as Additional Public Prosecutors and Public Prosecutors is based on a wholly unfounded assumption that inexperienced persons are appointed to handle the cases, which are tried in the Sessions Courts. At the cost of repetition, we deem it proper to mention that except for the post of Assistant Public Prosecutor, no person can be appointed to cadred posts unless he possesses the minimum academic qualification i.e. Bachelor's Degree in any subject with Bachelor's Degree of Law and has practice as an Advocate for at least seven years. Therefore, the members of Bar, who have requisite experience can compete for selection and appointment by direct recruitment and there is no basis for the complaint that the Advocates with sufficient experience are excluded from the zone of eligibility.

The petitioners' challenge to encadrement of 15 posts of Additional

Public Prosecutors Grade-I and 12 posts of Public Prosecutors is also liable to be negatived because, as mentioned above, the same does not result in depriving the practicing Advocates of their constitutional or legal rights and those who are eligible can compete for appointment to the post of Additional Public Prosecutor Grade-II by direct recruitment.

The argument of the learned counsel that recruitment made in accordance with the provisions of Section 24 (6) of CrPC may result in compromising independence of the Prosecutors is founded on a mistaken belief that those appointed as Assistant Public Prosecutors, Senior Assistant Public Prosecutors, Additional Public Prosecutors Grade-II and Grade-I and Public Prosecutors are susceptible to the pressures of extraneous forces including executive and political apparatus of the State. We cannot accept such preposterous assumption and declare
Section 24 (6) unconstitutional.

The role of Public Prosecutors came up for consideration before a five Judge Bench in **Sheonandan Paswan v. State of Bihar**[1]. Bhagwati, CJ and Oza, J expressed their views in the following words:

> "The Public Prosecutor is the counsel for the Government for conducting prosecution on behalf of the State Government or the Central Government, as the case may be. He is an officer and like every Advocate practicing before court, he also owes an obligation to the court to be fair and just; he must not introduce any personal interest in the prosecution nor must he be anxious to secure conviction at any cost. He must present the case on behalf of the prosecution fairly and objectively. He is bound to assist the court with his fairly considered view and the fair exercise of his judgment."

Venkataramaiah, J expressed his opinion in the following terms:

> "A Public Prosecutor is not a persecutor. He is the representative not of an ordinary party to a controversy, but of sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the land the twofold aim of which is that guilt shall not escape or innocent suffer. He should prosecute with earnestness and vigour. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as

it is to use every legitimate one to bring about a just one."

In **S.B. Shahane v. State of Maharashtra**[2], the Supreme Court emphasized the need of separate cadre of Assistant Public Prosecutors etc. and observed:

> "When Assistant Public Prosecutors are appointed under Section 25 of the Code for conducting prosecutions in courts of Magistrates in a district fairly and impartially, separating them from the police officers of the Police Department and freeing them from the administrative or disciplinary control of officers of the Police Department, are the inevitable consequential actions required to be taken by the State Government which appoints such Assistant Public Prosecutors, inasmuch as, taking of such actions are statutory obligations impliedly imposed upon it under sub-section (3) thereof. When such consequential actions are taken by the State Government in respect of large number of persons appointed as Assistant Public Prosecutors, it becomes necessary for putting them on a separate cadre of Assistant Public Prosecutors and creating a separate Prosecution Department as suggested by the Law Commission in its Report making those Assistant Public Prosecutors subject to control of their superiors in the hierarchy in matters of administration and discipline, with the head of such Prosecution Department being made directly responsible to the State Government in respect of conduct of prosecutions by the Assistant Public Prosecutors of his department."

The Government of Andhra Pradesh has already framed rules for constitution of separate prosecution service and laid down the method of recruitment which, as mentioned above, do not suffer from any constitutional or legal infirmity.

In the result, the writ petitions are dismissed.

G.S. SINGHVI, CJ

C.V. NAGARJUNA REDDY, J

December 27, 2006
svs

[1] (1987) 1 SCC 288

[2] 1995 Supp (3) SCC 37